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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 788

SOUTHERN RAILWAY COMPANY, AND SOUTHERN RAILWAY-CAROLINA DIVISION, *Petitioners,*

v.

MARY O. YOUNGBLOOD, AS ADMINISTRATRIX OF THE ESTATE OF CLEVELAND J. YOUNGBLOOD, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

To the Honorable the Supreme Court of the United States:

Your petitioners, Southern Railway Company and Southern Railway-Carolina Division, pray this Court to review on writ of certiorari a judgment of the Supreme Court of the State of South Carolina in the case of *Mary O. Youngblood, as Administratrix of the estate of Cleveland J. Youngblood, deceased, v. Southern Railway Company and Southern Railway-Carolina Division,* rendered on the 14th day of December, 1931, as shown by the opinion of that Court (R. 165). Under the practice prevailing in South

Carolina, no final judgment, separate from the opinion of the Supreme Court, is rendered, and the opinion is the final judgment. The record has been reprinted in this Court, and page references herein are to the record as printed for this Court.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Brief History of the Case.

This was an action by the plaintiff administratrix for damages for the alleged wrongful death of her intestate. It was brought, tried and decided under the Federal Employers' Liability Act, 35 Stat. 65-66, 45 U. S. C. 51-59. It was alleged in the complaint and admitted in the answer (R. 2, 4) and it appears from the evidence without dispute (R. 16, 23, 91, 147-149) that at the time of the fatal injury the intestate was employed and the railway companies were engaged in interstate commerce and transportation.

The judgment of the Supreme Court of South Carolina, sought to be reviewed, affirmed judgment for plaintiff administratrix, on a verdict for $12,500.00, as damages for the alleged wrongful death of her intestate, employed by petitioners as conductor on an extra train consisting of an engine and tender running light. He was killed while riding in the cab with the engineer and fireman, in a head-on collision with a superior train, resulting from his own disobedience of a written meet order which had been furnished him, which he had read and had in his possession, and which had been neither fulfilled, cancelled, nor annulled. The collision occurred about 9:30 or 9:35 a. m., in a heavy fog, after the intestate's train had passed the ordered meeting point, Orangeburg, S. C., at 9:25 a. m., and had run three miles beyond, colliding with the opposing superior train on the main line just beyond Stilton.

The collision resulted also in the death of the engineer on intestate's engine and in the deaths of three members of the unoffending superior train, the conductor, the engineer and the fireman (R. 7, 143).

There were three trials of this case in the state court (R. 166). The first trial resulted in a judgment for petitioners on a directed verdict, but on appeal the Supreme Court of South Carolina reversed that judgment and remanded for a new trial. See 137 S. C. 47, 134 S. E. 660. Two justices, Cothran and Purdy, dissented on the ground that verdict was properly directed against the plaintiff and in favor of defendants.

The second trial resulted in a verdict for plaintiff, respondent here, for $35,000.00 On appeal from judgment on that verdict, the State Supreme Court reversed the judgment for errors of law committed and remanded again for a new trial. Purdy, J., an acting justice, did not participate in this decision, but Cothran, J., concurred in the reversal of the judgment but dissented from the granting of the new trial, asserting that the case should have been remanded for judgment in favor of defendants. See 152 S. C. 265, 149 S. E. 742.

The case was tried for the third time in the trial court and resulted in verdict and judgment in favor of respondent, plaintiff, for $12,500.00. It is the opinion and judgment of the Supreme Court of South Carolina affirming this judgment which is sought to be reviewed by this petition. That opinion and judgment, not yet reported, rendered December 14, 1931, is in the record (R. 165). Cothran, J., did not sit, being ill.

Reference to Cognate Case Involving Engineer's Death.

L. K. Dantzler, the engineer on the train of which Youngblood was conductor, was also killed in the collision (R. 7). A suit cognate to this suit was brought in the same court by his administratrix, Mary Elizabeth Dantzler, against these petitioners, to recover damages for the engi-

neer's death. It was tried on substantially the same evidence as the present Youngblood case, though on a separate record. It also resulted in a verdict and judgment against petitioners in the same amount of $12,500.00. That judgment was affirmed by the Supreme Court of South Carolina on the same day on which the opinion was rendered in this case, a separate opinion being written in the Dantzler case, but in which that court merely said that the questions raised were the same as in the Youngblood case, that the evidence was substantially the same, and that "what we have said, therefore, in the Youngblood case, disposes of the question here raised." (See Dantzler Record, 188.)

We refer to the Dantzler case here because petitioners are co-incidentally filing the record and a petition for certiorari and supporting brief with this Court in the Dantzler case also. That petition raises the same questions as the present petition and we suggest that this Court will probably desire to consider together the petitions in the two cognate cases.

With this in view, it is important to point out *in limine* that there is no allegation, charge or contention of the plaintiff in the Youngblood (conductor's) case that any negligence on the part of Dantzler (the engineer) caused Youngblood's death. Similarly, there is no allegation, charge or contention of the plaintiff in the case of Dantzler, the engineer, that any negligence on the part of Youngblood, the conductor, caused Dantzler's death. In neither case did the plaintiff charge any negligence on the part of any member of the innocent crew of the opposing train.

In each of the cases the judgment was recovered, and was affirmed by the Supreme Court below, solely on the theory that, notwithstanding the admitted negligence of the plaintiff's intestate which proximately caused his death, there was sufficient evidence to go to the jury that negligence of dispatchers and operators of petitioners contributed "in part" to the death.

In the present (Youngblood) case, the alleged negligence of dispatchers and operators relied on to support recovery was:

1. The failure to give the intestate at the meeting point an additional copy of the same meet order he had received at the starting point and under which he was running.

2. The failure to give verbal instructions, unauthorized by the rules, to the intestate at the meeting point, reminding him to obey his written meet order.

3. The giving the intestate a "clear board" at the meeting point, which, under the rules and under all the testimony, merely said to him, "I have no further orders for you, proceed under the order you have," and allowed him to pass the board for the sole purpose of reaching and entering the passing track, there to wait the meeting, superior train.

4. The failure to deliver copies of the meet order to the superior train at some point prior to the meeting point, which, if it had been done, would in no wise have changed the situation. The superior train would have proceeded on toward the meeting point and to the point of collision just as it actually did, confident that intestate's train was waiting in the passing track at the ordered meeting point.

In the Dantzler case (engineer's case) only the first three of the above outlined grounds of negligence are charged, no evidence or contention appearing on that record corresponding to 4 *supra*. With this exception, the theory of respondents in the two cases is virtually identical.

The Evidence and the Grounds of Negligence Asserted.

The evidence is somewhat voluminous, but the facts are practically undisputed and are as follows:

The engine, with tender, upon which the intestate was riding when he was killed, was identified as *Extra Train 483 West* (bound). The superior freight train with which

it collided head-on was identified as *Extra Train 723 East* (bound).

Petitioners own and operate, among other lines of railroad, a single track road between Charleston and Columbia, in South Carolina, through Branchville, Orangeburg, St. Matthews, Fort Motte, and Andrews, the freight yard near Columbia. In railroad terminology, trains running from Columbia to Charleston are considered eastbound trains, and from Charleston to Columbia westbound. On the morning of the accident the engine of a westbound freight train known as Extra 683 West became disabled at Forte Motte, a station about 19 miles west of Orangeburg (R. 23). This freight train, Extra 683 West, contained 24 cars of interstate freight (R. 91, 147-149). Petitioners kept a switching or yard engine at Branchville, a junction point about 18 miles east of Orangeburg, and decided to send that engine, No. 483, west to relieve the disabled engine at Fort Motte and carry the freight train on to Andrews, the freight yard near Columbia, the crew of this relief engine consisting of respondent's intestate as conductor, L. K. Dantzler as engineer, and J. B. Witherspoon as fireman (R. 23).

At the same time a freight train known as Extra 723 East was moving over the same line of road in an easterly direction from Columbia to Charleston. As it was necessary for these two trains, Extra 483 West and Extra 723 East, to meet and pass each other at some point on the road, the train dispatcher at Charleston wrote out and sent the following telegraphic order to Branchville and Orangeburg:

> "Extra 723 East get this order and meet Extra 483 West at Orangeburg. Engine 483 run extra Branchville to Andrews." (R. 23-24)

This was known as a form "31" order, and its serial number was 18. A form "31" order has to be signed for

by the conductor when delivered to him (R. 11). This order No. 18 was sent simultaneously to the Branchville and Orangeburg operators at 7:58 a. m. (R. 10, 24). The order to the Branchville operator was transmitted and received addressed only to Engine 483 (R. 27, 48), which meant that it was a 3-copy order (R. 15, 20, 51), and hence the operator at Branchville made three copies of the order, one for his file, and delivered two copies to respondent's intestate, who signed for the same at 8:32 a. m. (R. 11, 97). Conductor Youngblood delivered one copy of the order to Engineer Dantzler, and they read over the order in the presence of Fireman Witherspoon before their engine left Branchville (R. 104). The evidence is uncontradicted that there was nothing on the face of the order delivered to respondent's intestate at Branchville to indicate that he would be given additional copies of this order, or any other order, at Orangeburg (R. 28, 97).

The dispatcher at Charleston testified (R. 48), and his train order book showed (R. 150), that this order No. 18 as transmitted to Orangeburg was addressed to Extra 723 East and operator,—the words "and operator" in the address signifying that it was a five copy order, and that the operator at Orangeburg should make five copies of the order, one for his file and two copies to be delivered to the conductor of each train affected. However, the operator on duty at Orangeburg, T. E. Jones, testified that this order No. 18 as transmitted to him did not contain the words "and operator" in the address, but was addressed only to Extra 723 East, and hence he made but three copies of the order,—one for his file and two copies to be delivered to the conductor of the train addressed (R. 76). Shortly after this order was sent, Operator Jones at Orangeburg was relieved by Operator Tyson, and Jones turned over to his successor, Tyson, the three copies that he had made of this order No. 18 addressed only to Extra 723 East (R. 77). Under this arrangement the operator

at Orangeburg had no copies of the order for delivery to the conductor of Extra 483 West, respondent's intestate, as he would have had if the order had been received at Orangeburg as a 5-copy order (R. 81).

While these two trains, Extra 483 West and Extra 723 East, were both extra trains, Extra 723, being eastbound, was the superior train by authority of the time-table direction (R. 27-28, 38, 41-42, 141) and hence Extra 483 West was required to take the siding at the meeting point, as provided by rule No. 88 as follows (R. 153):

> "At meeting points between extra trains, the train in the inferior time-table direction must take the siding unless otherwise provided."

Also, rule No. 513 of petitioners' rule book is as follows (R. 160):

> "Approaching meeting points made by train order, the train to take siding may, after stopping, pass the stop signal immediately preceding the meeting point and proceed under control to the entrance switch of siding."

At 8:35 a. m. engine 483, then operated as a train, Extra 483 West, consisting of only the engine and tender, with Conductor Youngblood, Engineer Dantzler and Fireman Witherspoon riding in the cab of the engine, left Branchville and proceeded west toward Orangeburg (R. 97, 104). At Rowesville, a station about 8 or 9 miles east of Orangeburg, Conductor Youngblood was handed an order to the effect that No. 12, engine 1055, which was the regular passenger train from Columbia to Branchville, would wait at packing house switch Orangeburg until 9:15 for Extra 483 West (R. 105). This packing house switch is located about three-fourths of a mile east of the station at Orangeburg (R. 109). Extra 483 West proceeded on to the packing house switch, where it took the siding and waited for

the passenger train, No. 12, to pass (R. 105, 109). Extra 483 West then backed out on to the main line and proceeded toward the station at Orangeburg and stopped at a point about 100 yards east of the semaphore, which was showing red or the stop signal against this train (R. 82-84). The engineer, Dantzler, then sounded four blasts of the whistle for train order signals (R. 36, 79, 109), whereupon the operator at Orangeburg dropped the semaphore bar, indicating proceed or clear signal and signifying that he had no train orders for the crew of that train (R. 83). The semaphore at Orangeburg is located in front of the operator's office and about 75 yards east of the east switch of the passing track (R. 54, 93-94, 142), and a westbound train approaching Orangeburg would necessarily have to proceed past this semaphore in order to reach the entrance to the passing track. This passing track is about three-fourths of a mile long (R. 26, 94).

The operator at Orangeburg reported by telephone to the dispatcher at Charleston the arrival of Extra 483 West, and was told by the dispatcher "to clear him and let him go to the west end of the pass track and wait on Extra 723" (R. 49, 78). The dispatcher testified that he was anxious to get Extra 483 to Fort Motte as quickly as possible (R. 49), and that by waiting in the west end of the passing track instead of the east end, this train would be in position to make a more expeditious departure from Orangeburg after Extra 723 East had arrived (R. 61). When asked on examination by counsel for respondent why he did not deliver to the conductor of Extra 483 the verbal message received from the dispatcher, the operator at Orangeburg testified (R. 80): "He didn't tell me to tell him." This operator also testified that when he dropped the semaphore bar he knew that the crew of Extra 483 West had in their possession a train order requiring them to meet Extra 723 East at Orangeburg, and that when this engine passed by the semaphore and sta-

tion, he assumed it was going up in the passing track to wait on Extra 723 (R. 83-84).

Extra 483 West proceeded past this semaphore and past the east switch of the passing track and on down the main line to the west end of the passing track, where it stopped after another engine in the yards (No. 61) sounded one blast of the whistle, which was a cautionary signal (R. 113). As to what ensued, the undisputed testimony of Fireman Witherspoon is as follows (R. 106-107):

> "After we passed the semaphore, and was going up by the pass track switch another engine gave a blast of the whistle, which indicates stop, and Dantzler stopped and examined the switch, and we pulled up over the switch, and Youngblood came up and got on the engine * * * I asked him if he did not intend to back in there, and he said No, we have time to go to Stilton, and I went to work on my fire, and the next time I realized where we were we were going over the switch at Stilton, and I turned to him to ask if he was going in there, and at that time he hollered to me to get ready to jump,—we are going to hit."

Extra 483 West collided head-on with Extra 723 East at a point just west of Stilton, a small station 2.7 miles west of Orangeburg (R. 29), this collision resulting in the deaths of respondent's intestate, Conductor Youngblood, and Engineer Dantzler of the crew of Extra 483, and also in the deaths of Conductor Ulrich, Engineer Brown and Fireman Hopkins of the crew of Extra 723 (R. 29, 142). Extra 483 arrived at Orangeburg, the meeting point, at 9:25 a. m. (R. 52), and the collision occurred about 9:30 or 9:35 (R. 22, 52).

It was admitted in the record that copies of the train order No. 18 delivered at Branchville to the conductor and engineer of Extra 483 were found upon their persons after the collision (R. 24-25, 150).

There was evidence that the meet order might have been

delivered to the superior train, Extra 723, at a prior station on its run, west of the meeting point, instead of addressing it to that train at the meeting point (R. 18-19, 30-32). But all the evidence shows without dispute that this, if it had been done, could have had no effect to prevent the collision; that even if it had been done the superior train would have proceeded on toward the meeting point and to the point of collision, confident in the belief that the intestate and Extra 483 were obeying the meet order by waiting in the passing track at the meeting point (R. 43-44, 58, 116).

The grounds of negligence alleged against petitioners (R. 2-3) and submitted to the jury were: in not providing a safe and suitable place wherein and whereon the intestate employee could perform his work; in not providing safe and suitable appliances and instrumentalities with which the intestate employee could safely perform his duties; in failing to furnish safe and competent agents, officers and employees to direct the movements of the two trains; in furnishing unsafe and incompetent agents, officers and employees to direct the movements of the two trains; in failing to give proper orders for the movement of the two trains which were in collision; in giving wrong and improper orders for the movement of the two trains which were in collision; in not giving proper signals for the movement of the train on which the intestate employee was working; in giving wrong and improper signals for the movement of the train on which the intestate employee was working; and owing to the negligence of the agents, officers and employees in directing the movements of the two trains in collision.

The decedent, Youngblood, was 39 years of age at the time of his death, and left surviving him his widow, the respondent, 40 years of age, and six children, namely: Grace, age 14 years; Claude, age 11 years; Cleveland, age 9 years; Carl, age 6 years; Sarah, age 4 years; and

James, age 10 months (R. 9). Petitioners paid the deceased $2,333.07 as wages for the year preceding his death (R. 143), and respondent testified that she and the six children were dependent upon her intestate for support and were supported by him (R. 9-10), but there was no testimony as to what portion of his earnings the deceased contributed to the support of his family. No evidence was offered as to the deceased's or his widow's expectancy of life, and no proof as to what pecuniary assistance the decedent's family might reasonably have expected to receive from the continuation of his life.

At the close of all the evidence, petitioners moved for the direction of a verdict in their favor, which motion was overruled and exception taken thereto (R. 145-146, 163). The State Supreme Court sustained the trial court's refusal to grant petitioners' motion for a directed verdict (R. 165-171). This holding of the Supreme Court of South Carolina, petitioners contend, was erroneous, and is assigned as error.

Judgment was rendered for respondent in the sum of $12,500.00 (R. 1), which judgment was affirmed by the Supreme Court of South Carolina on December 14, 1931, as shown by its opinion and judgment in the record (R. 165-171).

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The entire evidence herein is wholly insufficient to prove actionable negligence of the petitioners, or that such negligence was the proximate cause of intestate's death; the entire evidence shows that the sole, efficient, proximate cause of intestate's death was his own negligence in disobeying his meet order; and the judgment for respondent should have been reversed, and judgment for petitioners should have been entered, as matter of law under the Federal statute.

Atchison, T. & S. F. R. Co. v. Saxon, October Term, 1931, No. 291, decided Feb. 15, 1932, 284 U. S. . . .;
Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351;
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139;
Yadkin R. Co. v. Sigmon, 267 U. S. 577, reversing and remanding without opinion 186 N. C. 519, 120 S. E. 56;
Davis v. Kennedy, 266 U. S. 147;
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Bradley v. Northwestern P. R. Co., 44 F. (2d) 683;
Paster v. Pennsylvania R. Co., 43 F. (2d) 908;
Southern R. Co. v. Hylton, 37 F. (2d) 843;
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Davis v. Payne, (Ore.) 216 Pac. 185, certiorari denied, 263 U. S. 720;
McDonald v. Great Northern R. Co., (Minn.) 207 N. W. 194.

2. The entire evidence herein shows that the intestate voluntarily exposed himself to risks and dangers so open and obvious that no ordinarily prudent man would have continued to face them, and he assumed the risk of his death.

Missouri Pac. R. Co. v. David, No. 365, October Term, 1931, decided Feb. 15, 1932;
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165;
Atlantic C. L. R. Co. v. Southwell, 275 U. S. 64;
St. L. S. F. R. Co. v. Mills, 271 U. S. 344;
Chesapeake & Ohio R. Co. v. Nixon, 271 U. S. 218;
Pryor v. Williams, 254 U. S. 43;
Chi., R. I. & P. Ry. Co. v. Ward, 252 U. S. 18;
Boldt v. Pennsylvania R. Co., 245 U. S. 441;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310;
Seaboard A. L. Ry. v. Horton, 233 U. S. 492;
Chesapeake & O. R. Co. v. De Atley, 159 Ky. 687, 167 S. W. 933, 935.

3. The Supreme Court of South Carolina misinterpreted the Federal Employers' Liability Act in upholding a recovery of substantial damages on the evidence, there being an entire absence of any proof as to what pecuniary assistance or support the named beneficiaries might reasonably have expected to receive from respondent's intestate had he lived.

Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173;
Michigan Central R. Co. v. Vreeland, 227 U. S. 59;
Nashville, C. & St. L. R. Co. v. Anderson, 134 Tenn. 666, 185 S. W. 677.

WHEREFORE, because said decision and judgment of the Supreme Court of South Carolina decided the foregoing Federal questions erroneously and contrary to the decisions of this Court, your petitioners, upon this petition, upon the annexed brief, and upon a certified transcript of the record of all proceedings in the Supreme Court of South Carolina, pray that a writ of *certiorari* be issued, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that upon such review the said judgment of the Supreme Court of South Carolina be reversed.

SOUTHERN RAILWAY COMPANY, AND
SOUTHERN RAILWAY-CAROLINA DIVISION,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of South Carolina has not yet been officially reported. It will be found in the record beginning at page 165.

II.

JURISDICTION.

The date of the judgment sought to be reviewed is December 14, 1931.

The jurisdiction of this Court is invoked on the ground that petitioners, in the courts below, claimed immunity from liability and asserted rights under the Federal Employers' Liability Act, 45 U. S. C. 51-59, a statute of the United States, which claim and rights were denied, and that petitioners have not heretofore had opportunity to submit said claim and rights for adjudication to any Federal tribunal, jurisdiction being therefore invoked under Judicial Code, Section 237, as amended, 28 U. S. C. 344 (b).

Some of the cases believed to sustain the jurisdiction of this Court are:

Atchison, T. & S. F. R. Co. v. Saxon, decided Feb. 15, 1932, 284 U. S. ..;
Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351;
Chesapeake & Ohio R. Co. v. Stapleton, 279 U. S. 587;
Unadilla Valley R. Co. v. Caldine, 278 U. S. 139;
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165;
Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472;
Chesapeake & Ohio R. Co. v. Nixon, 271 U. S. 218;
Yadkin R. Co. v. Sigmon, 267 U. S. 577;
Davis v. Kennedy, 266 U. S. 147;
Frese v. Chi., B. & Q. R. Co., 263 U. S. 1.

III.

STATEMENT OF THE CASE.

The case is sufficiently stated in the accompanying petition, in which the relevant facts are fully stated. References to the facts will be made and repeated in the body of this brief only as may be necessary to discussion of the questions involved.

IV.

SPECIFICATION OF ERRORS.

The errors assigned and relied on by petitioners are the following:

1. That the Supreme Court of South Carolina erred in refusing to sustain and overruling petitioners' exceptions 1, (a), (c), and (d), as follows:

Praying reversal of the verdict and judgment—

> "1. Because his Honor erred * * * in overruling the motion for direction of verdict in favor of defendants, upon the grounds:
>
> (a) That the only reasonable inference from the entire testimony is that the death of the plaintiff's intestate was caused solely by his own negligence and recklessness.
>
> * * * * * * * * * *
>
> (c) That the only reasonable inference to be drawn from the entire testimony is that the proximate cause of the injuries resulting in the death of plaintiff's intestate was the intestate's own violation of a positive meet order which he had in his possession, not fulfilled, superseded or annulled.
>
> (d) That there is no evidence of actionable negligence on the part of the defendants." (R. 163)

2. That the Supreme Court of South Carolina erred in refusing to sustain and in overruling petitioners' exception 1, (b), as follows:

Praying reversal of the verdict and judgment—

> "1. Because his Honor erred * * * in overruling the motion for direction of verdict in favor of defendants, upon the grounds:
>
> * * * * * * * * * *
>
> (b) That the entire testimony is susceptible of but one reasonable inference, namely, that the danger of the situation resulting in the death of plaintiff's intestate was so obvious that an ordinarily careful person would have observed and appreciated the same, and hence plaintiff's intestate assumed the risks thereof." (R. 163)

3. That the Supreme Court of South Carolina erred in refusing to sustain and in overruling petitioners' exception 1, (e), as follows:

Praying reversal of the verdict and judgment—

"1. Because his Honor erred * * * in overruling the motion for direction of verdict in favor of defendants upon the grounds:

* * * * * * * * *

(e) That there is no evidence as to pecuniary loss sustained by the beneficiaries named in the complaint as the result of the death of plaintiff's intestate and hence no evidence upon which to base an award of damages." (R. 163)

V.

ARGUMENT.

POINT I.

THE ENTIRE EVIDENCE HEREIN IS WHOLLY INSUFFICIENT TO PROVE ACTIONABLE NEGLIGENCE OF THE PETITIONERS, OR THAT SUCH NEGLIGENCE WAS THE PROXIMATE CAUSE OF INTESTATE'S DEATH; THE SOLE, EFFICIENT, PROXIMATE CAUSE OF INTESTATE'S DEATH WAS HIS OWN NEGLIGENCE; AND THE JUDGMENT FOR RESPONDENT SHOULD HAVE BEEN REVERSED, AND JUDGMENT FOR PETITIONERS SHOULD HAVE BEEN ENTERED, AS MATTER OF LAW UNDER THE FEDERAL STATUTE.

What was said by this Court in *Atchison, T. & S. F. R. Co. v. Saxon*, No. 291, October Term, 1931, decided Feb. 15, 1932, applies here:

"The cause is one of a peculiar class where we have frequently been obliged to give special consideration

to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted."

The Supreme Court of South Carolina in this case has imposed on petitioners a liability, under the Federal Employers' Liability Act, in plain disregard of controlling Federal law as laid down and enforced in numerous recent decisions of this Court, for the death of a conductor killed in a collision caused by his own reckless disobedience of a positive meet order which he had and was bound to obey. His disobedience of the order also caused the deaths of three innocent members of the crew of the unoffending superior train collided with, thereby imposing clear liability on petitioners under the Act for those innocent deaths. Petitioners have paid the claims for those deaths (R. 143). Yet the Act has been perverted to allow the administratrix of the employee, whose own disobedience of order and positive recklessness caused the disaster, to recover damages for his death.

Unless this Court grant this petition and give relief these interstate carriers have no protection against the unwarranted judgment and the Liability Act as interpreted by this Court has not been observed.

There is not here alleged in the complaint or relied upon to support the recovery any charge of negligence on the part of any other member of the crew of the intestate's train or on the part of any member of the crew of the opposing train. The sole support of the recovery is the alleged negligence of the dispatcher and/or of the operator at the ordered meeting point in the transmission and delivery of the order which the intestate admittedly received and disobeyed, and in failing to do certain additional things to remind him again of his order and thus seek to prevent his disobedience, and in signaling his train.

Succinctly stated, the question is this: when a conductor, riding with the engineer and fireman on the cab of and

in command of an engine running light with tender as an extra train and operated solely under authority of a written train order, delivered to him in duplicate at the start of his run, signed for by him and read over by him in the presence of the engineer and fireman, which written order was a meet order requiring him to meet an opposing superior train at a meeting point on his run, disobeys and disregards his meet order, proceeds up the main line in the territory of the other train almost three miles beyond the ordered meeting point and there collides with the unoffending opposing train in a dense fog and is killed in the collision resulting from his disobedience of the meet order, can it be held that the employer railroad is liable for his death under the Federal Act on the theory that a proximate cause "in part" of his death was the failure of the dispatcher and/or operator to deliver to him at the meeting point extra copies of the same meet order he already had, or to give him unauthorized verbal instructions to the same effect as that order, or their failure to furnish the order to the other train prior to the meeting point, in which event it still would have proceeded on to the point of collision confident that intestate's train was at the meeting point, or the act of the operator in giving the intestate a clear board at the meeting point thereby telling him, under the rules, "proceed past this board into the passing track under the order you have; I have no further orders for you"?

As this Court has frequently pointed out, one who claims under the Federal Act must in some adequate way establish, not only negligence, but also a proximate causal relation between the negligence and the injury or death.

Atchison, T. & S. F. R. Co. v. Saxon, 284 U. S. .., decided Feb. 15, 1932;
Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 354;
New York Central R. Co. v. Ambrose, 280 U. S. 486;
Chi., M. & S. P. R. Co. v. Coogan, 271 U. S. 472.

And the kind or amount of evidence required to prove negligence and to prove proximate cause is not subject to the control of the several states. This Court will examine the record, and if it is found that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed.

Cases cited, *supra.*

On the record here, it could not be disputed that the negligence of respondent's intestate, in violating a positive meet order and proceeding beyond the meeting point to a collision with a superior train or of whose approach he had full knowledge, was *a* direct, efficient, proximate cause of his death. The issue is whether on the record there is any evidence from which a reasonable inference could be drawn that any negligence of the employer carriers was also a proximate cause of the death "in part," so as to bring into play the comparative negligence rule of the Act. If not, and we assert this negative, then the negligence of the respondent's intestate was as matter of law the sole, efficient, proximate cause of his death and respondent cannot recover.

Theories Upon Which the Court Below Sustained Recovery.

On the first trial, the trial court directed verdict for petitioners saying:

> "I don't think the evidence distinguishes the case in any material way from the *Davis vs. Kennedy** case. I think that the evidence does not tend to show negligence in directing the operation of the trains, and that the letting down of the semaphore board brought about a condition under which the collision occurred; but the collision never would have occurred had not

*266 U. S. 147.

> the plaintiff violated orders which had been given him at Branchville,—and which had not at any time been superseded, directing him to wait at Orangeburg for 723. The collision was due entirely to the fault of the conductor Youngblood, in failing to carry out the orders that were given him at Branchville, and therefore under the authority of the *Davis vs. Kennedy* case * * *, I have to direct a verdict for the defendant. (See 137 S. C. 47, 134 S. E. 660.)

The opinion of the majority of the State Supreme Court on the first appeal, reversing judgment on the verdict directed for the defendants, 137 S. C. 47, 134 S. E. 660, held that there was evidence of employer negligence proximately causing the death, sufficient for submission to the jury, on the following theories:

1. That it was negligence for the operator at Orangeburg to drop the semaphore board.

2. That there was negligence, either on the part of the Charleston dispatcher or of the Orangeburg operator, in failing to treat the meet order addressed to Extra 723 as a 5-copy order and deliver extra copies thereof to intestate on Extra 483 at the meeting point.

3. That it was negligence for the operator at Orangeburg, after dropping the semaphore board, to fail to give additional verbal instructions to the intestate to the same effect as the written order he already had.

4. That it was negligence to fail to address and deliver the meet order to the opposing superior train, Extra 723, at some point prior to the meeting point.

The majority opinion said:

> "There is conflict in the testimony as to whether the dropping of the semaphore, the indication of which, according to the defendants' Rule Book is 'Proceed', indicated to Youngblood that his previous orders had been fulfilled and that he might proceed to his destination or merely that the Orangeburg operator had no further orders for him and that he should

carry out the order he already held by meeting Extra 723 at Orangeburg.

"The movement of the trains was entirely in the hands of the dispatcher and the operator, who were responsible for the proper movement and signaling thereof. Over these agents of the defendants the conductor had no control but in fact received his orders from them.

"As this case must be sent back for a new trial we shall not comment at length or in detail on the testimony. There was testimony tending to show negligence on the part of the defendants in the matter of signaling and directing the movement of the trains in question. The meet order being sent to the superior train at the meeting point, a situation arose which, under the defendant's rule, required special precautions to insure safety. A question of negligence on the part of the defendants arises in connection with the sending of the meet order by the dispatcher at Charleston or its disregard by the operator at Orangeburg. The operator at Orangeburg also failed to stop the train and give the crew the verbal instructions which the dispatcher at Charleston testified that he had directed him to give. Hence, we are of the opinion that, in spite of any contributory negligence on the part of the deceased, Youngblood, the whole matter should have been submitted to the jury for determination."

The above is the only light to be found in either of the three opinions of the majority below as to their theory of possible employer liability.

On the second appeal, 152 S. C. 265, 149 S. E. 742, the majority disposed very briefly of the exceptions addressed to the refusal of the second trial court to direct a verdict, merely saying that the evidence was practically the same, though slightly stronger for the plaintiff, and referring to the opinion on the first appeal.

On the third appeal, the opinion of the court (R. 165-171) again dealt summarily with the questions here raised, merely by reference to and quotation from the opinion of

the majority on the first appeal, with no additional discussion of the evidence and no discussion of intervening decisions of this Court. The decision on the first appeal seems to have been treated as establishing "the law of the case," as to whether there was sufficient evidence to support a recovery. Of course, the Federal law as interpreted by this Court applies and controls and the state court cannot create a different "law of the case."

The dissenting opinions of Judges Cothran and Purdy on the first appeal, 137 S. C. 47, 134 S. E. 660, constitute a complete brief on the case. They conclusively demonstrate that there was no evidence of any carrier negligence causally related to the death, on any or all of the theories of the majority. They correctly construe and apply the decisions of this Court and of other Federal courts as we understand them.

Purdy, J., did not sit on the second appeal but Cothran, J., dissented, 152 S. C. 280, on the ground that the evidence entitled the defendants to a directed verdict. He discussed later decisions of this Court, especially emphasizing *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, and said:

> "In my opinion remanding the case for a new trial is but rolling empty barrels about, a profitless, wasteful enterprise. It does not appear to be appreciated that in cases involving the Federal Employers' Liability Act, not only, as admitted, are the Federal statutes and decisions upon every phase of the matter controlling, but the Supreme Court of the United States has promulgated, and time after time acted upon the principle, that they *will review the record of the case,* and if they find that there is no substantial basis in law for the liability of the employer, a judgment against him will be reversed; contrary to the principle announced by this Court, in cases under the laws of this state, that when there is any evidence tending to show liability, the judgment must stand, unless no other reasonable inference can be drawn from the evidence than that there is no liability."

In view of the above, we are forced to discuss each of the theories of carrier negligence which the State Supreme Court majority asserted on the first appeal to be sufficient to go to the jury.

The Meaning of Dropping the Semaphore.

There is no dispute on the record as to Youngblood's own negligence. He received the meet order, train order No. 18, at Branchville, and stated to Superintendent King the substance of the order, that he was to meet Extra 723 at Orangeburg (R. 139). He and his engineer, Dantzler, read over the order together, and shortly after the train pulled out from Branchville, in answer to a question from fireman Witherspoon as to what orders they had, Youngblood replied, "We have nothing but run extra to Andrews and meet 723 at Orangeburg" (R. 104). The evidence is uncontradicted that there was nothing on the face of the train order in his possession to indicate that he would be given additional copies of this order, or any other order, at Orangeburg (R. 28, 97).

When the intestate's train, Extra 483, proceeding west, reached Orangeburg, the meeting point, it stopped just east of the semaphore and sounded four blasts of the whistle. In response thereto, the operator at Orangeburg dropped the semaphore board to clear signal. Every witness in the case, without a single exception, who was questioned as to this change of the semaphore to clear signal, testified that it meant there were no train orders at that station for the crew of that train and for them to proceed on the orders they had (R. 36, 42-43, 55, 83, 119-120, 141). G. K. Fickling, who was not connected with the petitioner railroads, called as a witness for the respondent, testified on direct examination (R. 86):

> "Q. When the four blasts of the whistle were given, and the board drops, and drops from red to white,—what is the indication?

"A. To proceed.

"Q. What is the name of that when it is dropped?

"A. They call it a clear board.

"Q. That means what?

"A. *Proceed on the orders that you have.*

* * * * * * * * *

"Q. But when the board is dropped, the indication is what?

"A. *That they have no order for them.*"

And the witness Fickling testified on cross-examination (R. 88-89):

"Q. The only way that Extra 483 could have been operated was by train order?

"A. Yes, sir.

* * * * * * * * *

"Q. A verbal order would have no effect?

"A. No, sir.

"Q. It makes no difference who would give them, a verbal order itself is not binding?

"A. No, sir, if they had a written train order their duty was to comply with it.

* * * * * * * * *

"Q. If Captain Youngblood had in his possession a written train order, directing that he should meet a superior train at Orangeburg, wasn't it his duty upon reaching Orangeburg to go into a siding and wait on Extra 723?

"A. If he could find one to get in, yes, sir.

"Q. And there was one there a mile long?

"A. Yes, sir.

"Q. When the semaphore board is dropped, that is an indication that the station had no further train order?

"A. Yes, sir.

"Q. And that the conductor and the engineer should comply with the order that they had?

"A. Yes, sir."

H. C. Huggins, called as a witness for the respondent, testified that he had not been employed by a railroad since

1909, but had had experience as an engineer in main line service, and that he was familiar with the new rules of the Southern Railway Company and had copies of them in his office at Orangeburg. His manner or demeanor on the witness stand is apparent from a mere reading of his testimony, and it is manifest that he was overzealous to shield the intestate conductor from any blame and to fix negligence on the petitioners. He undertook to testify on direct argumentatively that dropping the semaphore board gave Youngblood authority to go to his destination, regardless of the meet order (R. 68, 75). He continued to make the same argument on cross-examination (R. 71) until challenged with the rules providing that a written train order remains in effect until fulfilled or superseded or annulled by another written order (R. 71). Then he swore that dropping the semaphore meant, "I have no further orders for you; proceed on the order you have," just as all the other witnesses testified (R. 71-72). He there said:

"Q. Now, when you drop that semaphore board,—what is that the sign of?
A. That he has no orders for you.
"Q. Then to do what?
A. To proceed.
"Q. On what?
A. On the running order that he had.

* * * * * * * * *

"Q. When the board drops it is an indication that he is to proceed on the orders that he has?
A. Yes, sir.
"Q. No doubt about that?
A. No, sir.

The situation is fully and clearly covered by petitioners' Rule 513 (R. 160), which shows exactly what the rights and duties of the intestate were. It provides:

"513. Approaching meeting points made by train order, the train to take siding may, after stopping,

pass the stop signal immediately preceding the meeting point and procede under control to the entrance switch of siding."

Rule 88 provided (R. 153):

"At meeting points between extra trains, the train in the inferior time-table direction must take the siding unless otherwise provided."

And Rule 97 provided (R. 154):

"97. Extra trains must not be run without train orders."

Intestate's train was in the inferior time-table direction. It was ordered and required to take the siding. It had no right to run without train order or in violation of its meet order. And, after stopping and receiving clear board, it had only the right to pass the signal immediately preceding the meeting point and to proceed under control to the entrance switch of the siding, entering the siding there in obedience of the meet order.

There is no substance of conflict on the record that this was true. The dropping of the semaphore told Youngblood there were no further orders for him at the meeting point, that he should proceed under the order he had, and merely cleared him to pass the semaphore for the sole purpose of getting into the passing track to obey that order, the passing track being the only place at which he could obey the meet order.

Conductor Youngblood was an experienced railroad man, having been employed by petitioner for many years (R. 9, 143), and he knew that dropping the semaphore board meant only that the operator at Orangeburg had no train orders for him, and he knew that he had to pass that semaphore and proceed 75 yards west of it in order to reach the entrance to the passing track at Orangeburg. He knew, as testified to by all the witnesses, that extra

trains are run only by train orders (R. 17-19, 28, 59. 82, 97, 119, 121, 130 and Rule 97, R. 154), and that "train orders once in effect continue so until fulfilled, superseded or annulled" (Rule 220, R. 156). He knew that a train order could not be superseded or annulled except by a subsequent train order in writing (R. 61, 121, 131), and when he got the semaphore signal that the Orangeburg operator had no train orders for him, he therefore knew that the written meet order in his pocket had not been superseded or annulled. He knew better than anybody else that he had not met and passed Extra 723, and hence his meet order could not have been fulfilled. He knew that his train, being westbound, was in the inferior time-table direction (R. 27-28, 38, 42, 141), and hence his train was required to take the siding at the meeting point (rule 88, R. 153). Also, he knew that, for the purpose of carrying out his meet order with the opposing superior train, he had a right, under rule 513 (R. 160), to disregard even the red board or stop signal of this semaphore and proceed past it under control to the entrance switch of the passing track. And when Conductor Youngblood, after passing the semaphore, failed to have his engine go in the passing track and await the arrival of Extra 723, but proceeded on the main line through the station yard and beyond Orangeburg, the meeting point, he violated the only order he had, and the only order that had been issued, governing the operation of his train.

There is no support in the evidence for the theory of the state court majority that it was competent for the jury to find that dropping the semaphore meant to Youngblood that his written order was cancelled or fulfilled, or that he was at liberty to disregard it and proceed to destination. All the evidence shows it meant to proceed under the written meet order he had.

The Treating of the Order Addressed to Extra 723 as a 3-Copy, Instead of a 5-Copy Order.

But the principal contention of respondent to support recovery, and to which the state court seems to have given most weight, is that if the meet order as addressed to Extra 723 at the meeting point had been treated as a 5-copy order, copies thereof being delivered to Youngblood at Orangeburg, this might have prevented his violation of the same order which was delivered to him at Branchville, and that the failure to do so was a negligent proximate cause of his death.

Observe that if this had been done Youngblood would only have received at the meeting point additional copies of the very order already in his possession and under which he knew he was running.

Thus the recovery rests here principally upon the theory that the failure of petitioners to give again to the intestate copies of the meet order which he already had, and their failure thereby to attempt to prevent him from violating an order which he was already bound to obey, was a negligent proximate cause of his disobedience of the order and of his resulting death.

What this Court said of such a theory in *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, is here directly applicable:

> "Still considering the case as between the petitioner and Caldine, it seems to us even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from train No. 15. A failure to stop a man from doing what he knows he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey."

So here, the doing of that the failure to do which is the negligence charged to support this recovery, *i. e.,* the giving to Youngblood of additional copies at the meeting

point of the meet order which he already had, would have furnished him no additional information or instruction, would only have given him an additional motive for obeying the meet order that he was already bound to obey. The failure of petitioners to stop him from doing what he knew he ought not to do cannot be called a proximate cause of his act of disobedience, or of his resulting death. It seems a clear perversion of the Act to say that when the employer has given the employee a proper and positive order, upon obedience to which his life and the lives of others depend, that the employer can be visited with responsibility, as for negligence, for his death resulting directly from his disobedience of the order, simply because the employer did not give him the same order again. That is to extend the employer's liability to that of an insurer or guarantor.

On this point the dissenting Justice, Cothran, well said, 137 S. C. 47, 134 S. E. 660:

> "It is impossible that the failure of 483 to receive the duplicate copies of the order, if the order had been properly transmitted as a 31-5-copy order and not as a 31-3-copy order, at Orangeburg, could have induced them to think that the order had been superseded or annulled. If these copies had been delivered to them they would not have had any more information than they already possessed from the orders which both conductor and engineer had received in Branchville and had in their pockets."

Failure of the Orangeburg Operator to Give Additional Verbal Instructions to the Same Effect as the Standing Written Order.

When intestate's engine, Extra 483, arrived at Orangeburg the operator there reported its arrival by telephone to the dispatcher at Charleston, and was told by the latter "clear him and let him go to the west end of the pass track and wait on Extra 723". (R. 49).

It is argued that the failure of the Orangeburg operator to give verbal instructions to Youngblood to go to the west end of the pass track and wait on Extra 723 could properly be found by the jury as negligence and as a proximate cause of the death.

The operator testified that he gave no such verbal instructions to Youngblood because he was not told to do so by the Charleston operator (R. 80).

In so far as such verbal instructions, had they been given, would have told Youngblood to wait in the pass track for Extra 723, they would merely have been a verbal repetition of the written order Youngblood already had. And, as to that, what we have said above with reference to failure to give additional copies of the order applies fully. Such verbal message would only have given the deceased an additional motive for obeying the written order he was already bound to obey. The failure to give such added motive cannot be a cause of his disobedience.

Besides, it would have been bad practice to attempt to give verbal instructions as to a matter already covered by a positive written order. The written order could only be superseded or annulled by another order in writing and it continued in effect until fulfilled, or superseded or annulled in writing (R. 61, 121, 131).

And finally, for the operator to have given the verbal instruction "go to the west end of the pass track and wait on Extra 723" would have been a highly dangerous proceeding as implying a verbal extension or modification of the standing written order. Under the written meet order, Extra 723 eastbound, as the superior train, had the right of way over the main line all the way to the east end of the pass track. In obeying the written order Youngblood's engine would have gone into the east end of the pass track to await 723. But if the operator had given the verbal instruction, it might have been construed as an attempt to modify the written order to the extent of giving

Youngblood the right of way to the west end of the pass track.

Had this been done, and had the collision occurred on the main line between the east and west ends of the pass track, a powerful contention of negligence could have been based on the partial abrogation of the written order by unauthorized verbal instructions. Certainly the failure to give such instructions was not negligence.

And certainly the failure to give them was not a proximate cause of the collision and deaths, which occurred after Youngblood had passed the west end of the pass track and proceeded nearly three miles further.

Judge Cothran made in his dissent an unanswerable comment on this theory of employer negligence, 137 S. C. 47, 134 S. E. 660, saying, with reference to the omitted verbal instructions:

> "Clearly this was an order, if it could be so considered, which the Train Dispatcher ran great risk in giving. Train 723 had the superior right of way from the west switch to the east switch of the passing track and that message required Youngblood to overlap the territory of 723 to that extent. If the collision had occurred between the two switches, much would have been made and, properly, of the indiscretion in such an order. Tyson would have been entirely justified in refusing to deliver it. Tyson cleared him to do what 483 was authorized under the rule to do; pass the semaphore and head into the east switch. How the failure to extend an order which should not have been given, could have caused Youngblood to disobey the meet order, refuse to enter the east switch which rules required him to do, refuse to enter the west switch which he was advised to do, and rush on upon an opposing train, is beyond my comprehension."

The Failure to Address the Meet Order to Extra 723 at Some Point West of the Meeting Point.

The only other suggested basis to support the finding of railroad negligence and proximate causation upon which

the judgment rests is that the opposing superior train did not get the meet order at some point west of the meeting point.

This is suggested in examination of witnesses by respondent's counsel (R. 30-31, 34, 45, 65-66) as being a violation of rule 208 (R. 155):

> "A train order must not be sent to a superior train at the meeting point if it can be avoided. When an order is so sent, the fact will be stated in the order and special precaution must be taken to insure safety."

The contention is that the meet order should have been given to Extra 723 at St. Matthews, 12 miles west of Orangeburg.

The State Supreme Court quoted this rule (R. 168) and in the opinion said (R. 170) that there was testimony tending to show negligent violation of it.

But there is no evidence on the record tending to show that the failure to deliver the meet order to the superior train prior to the meeting point had any causal relation to the collision. If that train had received the order at St. Matthews it would have had right of way to the meeting point just the same, and would have proceeded to the point of collision just as it did, believing Youngblood had obeyed the order and was waiting in the pass track at Orangeburg.

Only if Extra 723 had run past the meeting point and the collision had occurred east thereof could the failure to give it the meet order west of the meeting point have had a proximately causal relation to the collision. But it was struck by Youngblood's engine three miles west of the meeting point, while it was proceeding just as it would have been had it already received the meet order.

We again quote from the dissent of Cothran, J., 137 S. C. 47, 60, 134 S. E. 660:

"If there was the slightest evidence in the case that the failure, if there was such, to observe this rule, had any part in producing the disaster, the point would be worth considering. It could not possibly make any difference that 723 had not received notice of the order before they reached the meeting point, unless the failure to notify them in advance caused them to run by the meeting point and collide with the train they were expecting to meet, at some point *east* of the meeting point. As a fact, the collision occurred *west* of that point, at a place where 723 had the right to be, even if the order had been received before they left Columbia. Besides, the order which Youngblood received at Branchville and which he had in his pocket when extricated from the wreck, notified him that 723 was on the main line; that he must meet it at Orangeburg; and that he must take the side track there, being an inferior train, and allow it to pass, in accordance with Rule 88."

If Rule 208, under the circumstances stated, required "special precautions," certainly this injunction applied as well to the conductor of Extra 483, who was informed of the exact situation and who, nevertheless, passed and departed from the meeting point without exercising the slightest care, and, according to the uncontradicted testimony of the fireman (R. 106), consciously disregarded his meet order, asserting that he had time to go 2.7 miles further west to Stilton.

Evidently the thick fog (R. 6, 81, 107) prevented him and the other members of the crew from recognizing that they had reached Stilton, a small place with "just a few little warehouses and a little passenger shed" (R. 94-95), since they did not even go into the siding at Stilton, and the collision occurred just west of that point.

The Intestate's Negligent Violation of the Meet Order was the Sole Proximate Cause of his Death. The Recovery Cannot be Sustained Under Federal Decisions.

Even if it be assumed that there was any negligence of petitioners on any one or more of the theories of negligence upon which this recovery is sought to be supported, there is nothing to support a reasonable conclusion of efficient causal relation thereof to the collision and death. The only efficient, proximate cause, the only *causa causans*, was Youngblood's violation of a positive meet order.

This Court said in *Atchison, T. & S. F. R. Co. v. Toops*, 281 U. S. 351, where there was evidence of negligence but none of proximate causation:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer." (citing cases)

We submit that to sustain the verdict here on the theory that if extra copies of the meet order had been given the deceased at Orangeburg, or if the command of the meet order had been verbally repeated to him there, or if the other train had received the meet order west of Orangeburg, the collision might not have happened, would, as this Court said in the *Toops case, supra*, "remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture."

The only thing that caused the collision and death here was the violation of the meet order. The whole theory of the respondent, and of the State Court, is that petitioners should be held liable, not because they did anything to

cause the collision, but because they failed to do certain things which it is conjectured might have intervened to stop or affect the natural sequence of causation flowing from the intestate's violation of a positive order. Petitioners have been subjected to liability thus far because they did not prevent the intestate from doing what he had been ordered not to do and knew he should not do.

But such a theory does not square itself with accepted definitions of proximate causation:

> "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." 22 R. C. L. 110, sec. 2.
>
> "The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source."
>
> "That which originates and sets in motion the dominating agency that necessarily proceeds through other causes as mere instruments or vehicles in a natural line of causation to the result." 22 R. C. L. 111, 112, sec. 2.
>
> "The dominant cause from which the injury follows as a direct and immediate consequence." *Brady v. Oregon Lumber Co.* (Ore.), 243 Pac. 96, 45 A. L. R. 822.

Everything charged against petitioners as negligence was a failure to do something *prior* to the time when Youngblood actively violated his meet order. Nothing so charged intervened after his negligence or was an active, efficient cause. On the contrary, the natural, continuous sequence flowing from his act in passing the meeting point, unbroken by any intervening act of petitioners, led necessarily to collision and death.

We think the decision of this Court in *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, above quoted from, is controlling here. There the facts were substantially as follows:

The defendant railroad company, engaged in interstate transportation, operated trains on a single track from Richfield Junction, through Bridgewater and River Forks, to New Berlin, in the State of New York. Printed orders were issued to all employees: "Train No. 2 will pass train No. 15 at Bridgewater Yard," and "Train No. 15 will take turntable siding at Bridgewater to allow train No. 2 to pass." Unless countermanded in writing by the superintendent, these orders were permanent. They were not countermanded. Train No. 2 was a gasoline passenger car of which plaintiff's intestate, Caldine, was conductor, and Dibble was motorman. Train No. 15 was a freight train of which Risley was conductor. They collided head-on a short distance south of Bridgewater Yard, and Caldine was killed. There had grown up a custom by which Risley, the conductor of the freight train, if he was a little late, would telephone that fact from his last station before Bridgewater, and Dawson, the defendant's station agent at Bridgewater, would take this message and orally deliver it to Caldine, thus giving to him a further warning that he must obey the rule. On this occasion the telephone message was sent, but Dawson omitted to inform Caldine. Dawson asserted that he did tell Dibble, the motorman, but Dibble denied this. At any rate, through somebody's negligence, the customary special notice and warning did not reach Caldine. Nevertheless, the conductor, in violation of printed orders, signaled the gasoline car to proceed, and the motorman, also in violation of them, obeyed the signal and started the car in plain sight of the station agent. The Court of Appeals of New York (246 N. Y. 365, 159 N. E. 172), in affirming the judgment in favor of the plaintiff in the trial court, said:

"The conductor's negligence cannot be viewed as the sole proximate cause of the collision. The station agent could and should have prevented it; so could the motorman. All three were negligent. If Caldine had not signaled in violation of orders, the collision would not have occurred. Neither would it have happened if Dawson had communicated Risley's message to Caldine * * * Dawson knew that the freight was approaching; Dibble ought to have known it and should have kept his car stationary. Negligence was not solely Caldine's. His death resulted in part from the negligence of Dawson and Dibble."

This Court, in reversing the judgment of the New York Court of Appeals, said, pages 141-142:

"The phrase of the statute, 'resulting in whole or in part,' admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about by his own acts. See *Davis v. Kennedy*, 266 U. S. 147, 69 L. ed. 212 45 Sup. Ct. Rep. 33.

"Still considering the case as between the petitioner and Caldine, it seems to us *even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from train No. 15. A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey.*" (Italics added)

In comparing the facts of the *Caldine Case* with those of the present case, we submit there is no substantial distinction. An additional copy of the meet order delivered to Youngblood at Orangeburg, or an additional verbal instruction to the same effect, would only have given him another motive for obeying his train order, which he was already bound to obey at his peril.

The case of *Unadilla Valley Ry. Co. v. Dibble,* 31 F. (2d) 239, certiorari denied thereto, 280 U. S. 565, related to the same accident as that in the *Caldine Case, supra.* Dibble, the engineer, brought suit for damages on account of injuries received in the same collision in which Caldine, the conductor, was killed. The Circuit Court of Appeals of the Second Circuit held that the engineer was not entitled to recover damages, and after quoting from the decision in the *Caldine Case,* the opinion continues, page 240:

> "Now, between Dibble and the railway, Dibble is in the same position as Caldine. There was a rule made for the protection of each, and each violated it; Caldine by his order, Dibble by his act. While it did not lie in Caldine's mouth, when he deliberately disobeyed the rule, to say that the accident was due to Dibble, it equally did not lie in Dibble's mouth, under identical circumstances, to say that the accident was primarily due to the neglect of Caldine. As against the railway, each was primarily responsible for the injury which befell him."

The case of *Great Northern Railway Co. v. Wiles,* 240 U. S. 444, 448, was an action for damages for the death of a brakeman, suit bring brought under the Federal Employers' Liability Act. Wiles was a rear brakeman on a freight train, which came to a stop after passing a curve by reason of the breaking in two of a drawbar in one of the cars of the train. The freight train was followed shortly by a passenger train. The night was dark and the place of collision was obstructed by a sharp curve and a bluff, so that the rear end of the freight train could not

be seen for more than five car lengths away. It was the duty of Wiles, under the rules of the railroad company, to go back and flag the following train. This he failed to do, but remained in the caboose, and was killed in the ensuing rear-end collision. In reversing the judgment for the plaintiff, this Court said:

> "There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles,—a duty not only to himself, but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them, and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How impressive his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.
>
> "In the present case there was nothing to extenuate Wile's negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train; run back a short distance, and give the signals that the rules directed."

Applying the reasoning in this decision to the facts in the case at bar, there was nothing to extenuate Conductor

Youngblood's negligence. He knew the requirements and directions of the written order in his possession, and he knew the rule which provided that the inferior train must take the siding at the meeting point, and after he was cleared by the semaphore all that he had to do to fulfill his meet order and avert the collision was to head in the east switch of the passing track, or back in at the west end, and await the arrival of Extra 723. Certainly, as was said in the *Wiles Case*, "his duty was as clear as its performance was easy." And in the instant case the tragedy of the collision was truly "appalling," for Conductor Youngblood and the engineer of his train, in failing to obey their meet order, brought death not only to themselves, but also to three members of the unoffending crew of the opposing train,—the conductor, engineer and fireman.

In the case of *Virginian Railway Co. v. Linkous*, 230 Fed. 88, reaffirmed on rehearing, 235 Fed. 49; certiorari thereto denied, 242 U. S. 630, the intestate was engineer of train 468 moving east, and was killed in a head-on collision with another train 33, moving west. He and his conductor had received a meet order for train 33 at a certain point. Three other employees, including the conductor, were riding in the cab of the engine, and all had notice of the meet order, copies of which were found upon their persons after the collision. Train 468, of which Linkous was engineer, ran by the meeting point without heeding the meet order, and collided with train 33 a short distance east of the meeting point. The plaintiff contended that the collision was not solely the result of the negligence of the engineer, but was "in part" due to the negigence of the other employees who were riding on the engine and had notice of the meet order. The Court denied the contention, holding that the engineer was directly responsible for the collision, and that the plaintiff could not come within the provisions of the Federal Employers'

Liability Act by relying upon the alleged negligence of the companions of the engineer.

In *Frese v. Chicago, B. & Q. R. Co.*, 263 U. S. 1, 3, the intestate was the engineer of a train which collided with another at a grade crossing of the two railroads. Both trains stopped in compliance with a State statute, but did not discover each other and pulled ahead and collided, killing Frese. Frese's view of the other track was obstructed intermittently until the crossing was reached, and his administratrix contended that she was entitled to recover under the Federal Employers' Liability Act upon the ground that there was evidence of negligence on the part of the fireman, who was sitting on the side toward the other approaching train, in not discovering the presence of the other train and warning the engineer; and that, even if Frese was negligent, such negligence would not completely bar a recovery. In denying a recovery on behalf of the engineer, this Court held that there was no evidence of negligence on the part of the fireman, and, if there had been, the result would have been the same, saying:

> "Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act * * * to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

Manifestly the word "subordinate", used in this last sentence, is merely a term of identification. The meaning would have been no different if the word "fireman" had been used. If the conductor had been the engineer's companion, the rule would have been the same as in the *Linkous Case*, although not a subordinate.

A very exhaustive and clear opinion on the negligence of a railroad employee holding it to be his sole negligence where a collision occurred by reason of the violation of a train order, is that of *Davis v. Payne,* 108 Ore. 72, 216 Pac. 185, certiorari thereto denied, 263 U. S. 720. In that case it was alleged, as grounds for recovery, that the conductor and fireman of Davis' train also had copies of the order, the violation of which caused the collision, and that the conductor, when at Carvallis, negligently gave Davis instructions to proceed; that the conductor at any time could have stopped Davis by turning on the air in the caboose; that the order should have read "Cook to Oswego" instead of "Beaverton to Oswego"; and that the order should have been given to the plaintiff at Oswego instead of at Portland, the starting point. Also, that a "meet order" should have been given, requiring No. 231 to be held at Oswego until No. 234 arrived there. These, in substance, were the various allegations of negligence in the complaint. The action was tried under the Federal Employers' Liability Act.

The answer denied any negligence, and affirmatively alleged that the plaintiff's injury was caused solely by his own negligence in disregarding and refusing to obey the written order above referred to, which was: "No. 234, engine 2911, has right over No. 231, Beaverton to Oswego." The trial resulted in a verdict of $25,000.00, and judgment thereon, from which an appeal was taken to the Supreme Court of the State of Oregon. This judgment was reversed and a judgment ordered in favor of the defendant, the Court saying in its opinion:

> "The plaintiff was charged with the primary responsibility of moving the train, and it was his hand alone that moved the train from Oswego to the place of the wreck. In doing this he violated train order No. 226 and rules No. 83(b) and No. 906. He had no right to leave Oswego until he received a memorandum from the conductor, and it was his own act, and

his act alone, which produced the injury he complains of * * * He brought about the death of the engineer on train No. 234 who was rightfully proceeding from Cook to Oswego, and who was acting in strict conformity to train order No. 226. To hold that Congress intended by the Federal Employers' Liability Act, under the circumstances disclosed in this case, to penalize the carrier, and to reward the disobedient employee with a judgment against the carrier for $25,000.00, is unthinkable, and until such a construction is placed upon that Act by the Federal Courts, this Court ought not to uphold this judgment * * *

"Plaintiff having been notified that train No. 234 had a superior right over his train, between the stations of Oswego and Cook, it was his duty to remain at Oswego until the arrival of the superior train, and the carrier was under no obligation to repeat the order at Oswego, or to inform him when the superior train left Cook."

It was contended by the plaintiff in that case that the operator at Oswego was negligent in giving Davis a clear signal. (The respondent in the case at bar seems to rely upon the identical contention.) In answering that contention, the Oregon Supreme Court said:

"This contention has no merit. The dropping of the bar by the dispatcher could give him no right to proceed contrary to orders previously received. The only effect of this signal was to inform him that the dispatcher at Oswego had no order in his hands for the conductor and engineer of the train. The signal given by the operator did not supersede, or in any way change or modify the effect of, the order previously given * * * The order previously given could only be revoked by a subsequent order, and when the operator signaled that he had no order for train No. 231, plaintiff knew that the previous order had not been revoked, countermanded, or superseded."

Davis v. Kennedy, 266 U. S. 147, 148-149, was an action brought under the Federal Employers' Liability Act for the death of an engineer in a head-on collision. Kennedy was the engineer of train No. 4, going west from Nashville. He collided with train No. 1 coming east to Nashville. There were double tracks at Nashville uniting into a single track a little farther west. Under train schedules, No. 1 had the right of way, and the crew of No. 4, including Kennedy, had standing positive orders not to pass on to the single track unless they knew that No. 1 had finished its use and entered on the double track. These orders were disregarded by the crew of No. 4, and the collision resulted. The Supreme Court of Tennessee, affirming judgment for plaintiff, held that the other members of the crew, as well as Kennedy, were as much bound to look out for the approaching train as he was, and that their negligence was a contributing cause of the collision, notwithstanding the obligation of the engineer to obey the passing order. It seems clear enough that there was negligence in this respect by the other employees, and that, if they had done their duty, the collision would not have occurred; but this Court reversed the judgment of the Tennessee court, saying:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

In the case at bar, the intestate conductor was riding in the cab of the engine, and, under the rules of the railway company, he was jointly responsible with the engineer for the safe movement of the train and the observance of

the rules (Rules 105 and 1137, pages 155 and 162 of record), and they were jointly charged with the primary duty of fulfilling the meet order in their possession.

In the case of *Yadkin Railroad Co. v. Sigmon*, 267 U. S. 577, as appears from the decision of the Supreme Court of North Carolina (186 N. C. 519, 120 S. E. 56), the administratrix had recovered damages for the death of an engineer in a head-on collision occurring after his train had passed a station without observing a meet order. It was held by the state court that, although the decedent engineer was negligent in failing to obey the meet order, it was also the duty of the conductor and flagman, when they found the engineer had gone contrary to orders, to signal the train to stop. Both the conductor and the flagman apparently forgot the order, and did not so signal the engineer. Instead of thus reminding the engineer of his obligation, the flagman pulled the signal cord giving the engineer the signal to go ahead, and the conductor, although apparently observing him do so, did not interfere. The Supreme Court of North Carolina held that their negligence was a contributory cause of the death of the engineer, and that the jury was therefore empowered, under the Federal Employers' Liability Act, to apportion the recovery according to the ratio which they found should exist between the causal effect of the contributory negligence of the engineer and that of the defendant railroad company in the conduct of its conductor and flagman. This Court reversed this decision and remanded the cause for further proceedings, upon the authority of *Davis v. Kennedy*, and *Frese v. Chicago, B. & Q. R. Co., supra.*

In *McDonald v. Great Northern R. Co.*, (Minn.) 207 N. W. 194, the engineer, McDonald, was killed in a head-on collision. He and the conductor, McCabe, had both received a meet order. Before the train which they were to meet at a certain station had arrived, the engineer signaled the conductor that he was ready to proceed. The conductor signaled him ahead. Both had forgotten their

orders. The plaintiff sought to come within the protection of the Federal Employers' Liability Act by reliance upon the negligence of the conductor in signaling the engineer ahead, as contributory "in part" to the disaster. The plaintiff had a verdict in the trial court, and, upon appeal, the Supreme Court of Minnesota reversed the judgment of the trial court, saying:

> "Both the engineer and conductor had a duty, personal to himself, to see to it that order 56 was not violated. Its violation by McDonald, in the absence of some other intervening and efficient cause, was negligence which continued to the place of collision, and was the producing cause of the accident. The fact that McCabe was also guilty of negligence in his silent permission in allowing the engineer, who was the primary wrongdoer, to violate the order, will not permit plaintiff to recover upon the theory that McCabe's negligence was a contributing cause. To so hold would permit the anomaly of an employee violating orders proximately resulting in his own injury to recover *upon the theory that if some other employee had done his duty and prevented the violation the injury would not have occurred.*" (Italics added.)

A case in which the concurring negligence relied on was not that of an associate or subordinate of the plaintiff, but of an employee in another department, is *Southern Railway Co. v. Hylton,* 37 F. (2d) 843, certiorari denied, 281 U. S. 745, wherein the Circuit Court of Appeals of the Sixth Circuit held that the engineer's disobedience of the train dispatcher's order to look out for a steel gang laying rails was the sole efficient cause of the derailment resulting in his death, notwithstanding the negligence of the track gang foreman in failing to send out a warning flag far enough up the track to enable the train under fair control to stop, as required by a rule or by custom.

In a well considered opinion by Circuit Judge Wilbur in the case of *Bradley v. Northwestern Pac. R. Co.,* 44 F.

(2d) 683 (C. C. A., 9th Ct.), the Federal decisions were reviewed and a recovery denied for the death of an engineer who failed to obey an order to meet an extra freight at a certain point, notwithstanding the conductor failed to give warning by whistle as required by the rules of the railroad company.

In the case of *Paster v. Pennsylvania R. Co.*, 43 F. (2d) 908, the Circuit Court of Appeals for the Second Circuit reversed a judgment in favor of a car repairer who was injured while violating the rule requiring him to place blue flags. It held, under authority of the recent decisions of this Court, that the disregard by the servant of specific orders or standing rules, promulgated for his own safety, will bar his recovery although the injury was due also to the fault of other servants.

In our present case it will be recalled that there is no allegation or contention of employer negligence based on negligence attributed to the engineer of intestate's train, or to any other member of its crew, or to any member of the crew of the train collided with.

There is no logical escape from the conclusion that the decedent conductor's death was directly and proximately due to the running of his train beyond Orangeburg, the meeting point, in violation of train order No. 18 which he received at Branchville, and that there was no negligence on the part of the crew of the other train in the collision. It seems to us clear that it would be a perversion of the statute to allow his representative to recover upon the theory that if other employees had done their full duty they might possibly have prevented Youngblood from violating his train order. The order in Conductor Youngblood's possession, and under which he had run his train from Branchville to Orangeburg, contained all the information that he would have had from getting a copy of the order at Orangeburg, and from a further direction from the operator there to take the side-track—

directions purely cumulative—disclosing nothing more than he already knew, and in no way changing or superseding his order. The operator at Orangeburg cleared Conductor Youngblood by the semaphore to do what he was authorized and required to do under the terms of his train order, and when he passed this semaphore and failed to have his engine go in the east end of the passing track, declined the fireman's suggestion to back in at the west end, but proceeded on the main line through the station yard and beyond, he set in motion the instrument of death, and from that moment to the time of the collision resulting in his death there was no intervening negligent act on the part of any of the "officers, agents, or employees" of the petitioners that contributed in any degree to the accident. The negligence of the intestate conductor continued from the inception of his violation of his meet order up to the moment of the fatal collision, and was unbroken and uninfluenced by any act or neglect of petitioners.

Whether Youngblood's disregard of his train order was intentional or attributable to mental aberration, and whether such reminder and additional motive would have prevented him from violating his order, can only be surmised and at best are matters of guesswork. The inescapable fact remains that he himself did violate the plain terms of his positive meet order, and received his fatal injuries as the direct result of that violation.

POINT II.

THE ENTIRE EVIDENCE HEREIN SHOWS THAT THE INTESTATE VOLUNTARILY EXPOSED HIMSELF TO RISKS AND DANGERS SO OPEN AND OBVIOUS THAT NO ORDINARILY PRUDENT MAN WOULD HAVE CONTINUED TO FACE THEM, AND HE ASSUMED THE RISK OF HIS DEATH.

There is no charge made in this case that petitioners violated any Act of Congress enacted for the safety of employees (45 U. S. C. 54). Hence the defense of assumption of risk remains in full force as at common law.

Missouri P. R. Co. v. David, No. 365, October Term, 1931, decided Feb. 15, 1932;
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165;
Atlantic C. L. R. Co. v. Southwell, 275 U. S. 64;
St. L.-S. F. R. Co. v. Mills, 271 U. S. 344;
Chesapeake & Ohio R. Co. v. Nixon, 271 U. S. 218;
Boldt v. Pennsylvania R. Co., 245 U. S. 441;
Seaboard A. L. Ry. v. Horton, 233 U. S. 492.

As applied to actions under the Federal Employers' Liability Act, it is held that the employee assumes all the ordinary risks and hazards of his occupation, whether appreciated by him or not, and likewise assumes extraordinary risks and hazards known to and appreciated by him, even though caused by the master's negligence.

Chi., R. I. & P. Ry. Co. v. Ward, 252 U. S. 18.

We appreciate that a distinction has always been drawn in general between assumption of risk and contributory negligence under the statute.

Pryor v. Williams, 254 U. S. 43;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310;
Seaboard A. L. R. Co. v. Horton, 233 U. S. 492.

This Court stated the distinction thus in the *Horton Case, supra:*

> "The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employees."

However, this Court did not say that assumption of obvious risks *must* be free from the suggestion of fault or negligence on the part of the employee, or that the defense of assumption of risk cannot exist if negligence of the employee contributed to the risk.

If that were the necessary implication of the distinction it would put a premium on the negligence of the employee, since an employee would be barred of recovery as having assumed even unusual and extraordinary risks if known to him, provided no negligence of his own helped create the risks; but, if the very same kind of risks were contributed to by his own positive negligence, he would not be barred but would be entitled to a comparison of negligences.

We submit that the distinction becomes tenuous to the point of substantial non-existence when the risks and hazards of the work immediately engaged in, whether caused by the negligence of the master alone, or by that of the employee alone, or by the concurrence of both, are not only fully known to and appreciated by the employee but also so open and obvious that no man of ordinary prudence would continue in the face of the danger.

We believe the Court of Appeals of Kentucky suggested the proper solution of the apparent paradox, in *Chesapeake & O. R. Co. v. De Atley,* 159 Ky. 687, 167 S. W.

933, 935, reversed on other grounds, 241 U. S. 310, when it said:

> "Notwithstanding this distinction, it is generally held that assumption of risk and contributory negligence frequently approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. Narramore v. Cleveland, etc., R. Co., 96 Fed. 298."

We submit that the risks and dangers of running an inferior train, on a single track railroad, in a dense fog which obscured visibility, in the direction of a superior train known to be approaching from the opposite direction and known not to expect the inferior train to be where it was, and in clear violation of a positive meet order, were so open and obvious that no man of ordinary prudence would have engaged in such a hazardous enterprise. If Youngblood could conceivably have been engaged in such an undertaking with full knowledge of the risks, but without fault of his own, it seems clear under the decisions that he would have assumed the risks and that his administratrix would have been barred of recovery.

We do not believe the statute intended that the administratrix should be in better position to recover merely because her intestate's negligent and reckless conduct in disobeying a written meet order produced the very situation of open and obvious danger and peril in which he found himself.

We submit that the judgment below should be reversed on the ground that respondent's intestate assumed the risk of his death, as well as on the ground that the sole proximate cause of his death was his own negligence.

POINT III.

THE SUPREME COURT OF SOUTH CAROLINA MISINTERPRETED THE FEDERAL EMPLOYERS' LIABILITY ACT IN UPHOLDING A RECOVERY OF SUBSTANTIAL DAMAGES IN THE ABSENCE OF PROOF OF WHAT PECUNIARY ASSISTANCE OR SUPPORT THE NAMED BENEFICIARIES MIGHT REASONABLY HAVE EXPECTED TO RECEIVE FROM THE DECEASED EMPLOYEE HAD HE LIVED.

It is the contention of petitioners that, in any view of this case, there was not sufficient evidence on which the jury could base an award of damages, and hence that the State Supreme Court erred in sustaining the trial court's refusal to grant petitioners' motion for a directed verdict on this ground.

In an action under the Federal Employers' Liability Act for death, the damages can only be compensatory, and the measure of them is what the beneficiaries named in the statute necessarily lose by the death of the deceased employee. Unless the plaintiff shows that the qualified beneficiaries have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee, there can be no recovery.

In the case of *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 70, it was held that only the pecuniary loss or damage is allowable, and that loss is not dependent upon any legal liability of the injured person to the beneficiaries. That may be one, but it is not the sole, test. "There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

In *Gulf, C. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 175, this Court, in overruling the decision of the Texas Court of Civil Appeals, said:

"The Court of Civil Appeals upheld this ruling, saying that the Federal 'statute expressly authorized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him.' 147 S. W. 1189. This construction of the character of the statutory liability imposed by the Act of Congress was erroneous. In a series of cases lately decided by this Court, the Act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the *actual pecuniary loss* resulting to the particular person for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues *as are shown* to have sustained some pecuniary loss." (Italics added.)

In the case at bar the respondent merely testified as to the amount her intestate was earning at the time of his death, and that she and her children were dependent upon him for support. There was no testimony as to the deceased's or his widow's expectancy of life, not even the mortuary tables being introduced in evidence.

The respondent's entire testimony in this regard was as follows (R. 9):

"Mr. Youngblood was thirty-nine years old when he died and we had been married sixteen years. At the time of his death he was employed by Southern Railroad as Conductor and had been working for them sometime. His compensation was about twenty-three or twenty-four hundred dollars the year before his death. I am administratrix of his estate. We had six children, all of whom are now living. Grace was fourteen years old, Claude, eleven years, Cleveland, nine years, Carl, six years, Sarah, four years, and James was ten months. Mr. Youngblood supported myself and the children. My age is forty years."

And the following (R. 9):

> "Mr. Youngblood was very tall, over six feet, and weighed about two hundred and twenty-five pounds. He had been working for the Southern Railway for about twenty years, I think. He had worked for them since we were married, and before we were married, and had risen to the position of Conductor. His health was good * * * The six children and myself depended on Mr. Youngblood for support."

The damages, if any, recoverable in this action are necessarily based entirely upon the deprivation of future pecuniary benefits which the respondent and her children might have reasonably received from the intestate had he lived, and it seems to us that the life expectancy of the intestate and of the respondent was an indispensable factor in computing the amount of such reasonably expected pecuniary benefits. There was an utter absence of proof as to the amount the decedent conductor contributed out of his wages to the support of his family, or as to what pecuniary assistance they might reasonably have expected to receive from a continuation of his life, and no facts from which the jury could estimate the monetary loss to the beneficiaries by reason of the death. The necessary elements of the calculation were missing.

In the case of *Nashville, C. & St. L. R. Co. v. Anderson,* 134 Tenn. 666, 185 S. W. 677, an action under the Federal Employers' Liability Act, the deceased employee left a widow and infant child. We quote from the opinion of the Tennessee Supreme Court as follows:

> "The pecuniary loss of these beneficiaries was not what the deceased might have earned, but what part of his earnings they might reasonably have expected to receive.
>
> "Further, it seems very clear from a study of the

decisions of the Supreme Court of the United States * * * that there must be evidence of pecuniary damage before such damage can be allowed. This rule is enforced with more strictness by the Supreme Court of the United States, perhaps, than by some of the State courts in jurisdictions where acts fashioned after Lord Campbell's Act prevail.

"In this case deceased's age, expectancy, and earning capacity were proven. *It was also proven that his wife and child were dependent upon him for support. There was no proof, however, as to the value of his customary contributions to the support of these beneficiaries, and nothing to indicate what such beneficiaries might reasonably have expected from him in the way of support.*

"In this case it was only shown that the beneficiaries of this suit had sustained a loss. *There was no proof as to the extent of the loss. There was proof of the earning capacity of the deceased and his expectancy, but there was nothing to show what these beneficiaries might reasonably have expected to receive from the deceased, and under such circumstances, under the rules laid down in the late Supreme Court cases, no recovery for more than nominal damages could stand.*

"The elements of damage to be considered by the jury are indicated in the foregoing authorities. *There must be proof to show the reasonable expectation. Under the reasoning of the Supreme Court decisions, the widow's expectancy of life should be taken into account in estimating her loss.*" (Italics added.)

CONCLUSION.

For the reasons assigned in the petition for certiorari, and because of the facts and the law set out in this brief accompanying said petition, we respectfully submit that the writ of certiorari should be granted, and that, after full consideration by this Court, the judgment and decision of the Supreme Court of South Carolina herein

should be reversed and judgment be entered in the cause for your petitioners.

Respectfully submitted,

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